STATE OF SOUTH CAROLINA

BEFORE THE PUBLIC SERVICE COMMISSION

Docket No. 2019-362-A

IN RE: Rulemaking for the Public Service Commission to Create a New Regulation 103-811.5 Role of the Qualified Independent Third-Party Consultant and Expert and the Commissioners' Reliance on the Contents of the Qualified Independent Third-Party Consultant and Expert's Report	)	**JOHNSON DEVELOPMENT ASSOCIATES, INC.'S WRITTEN HEARING COMMENTS IN SUPPORT OF PROPOSED RULEMAKING**

Johnson Development Associates, Inc. ("JDA"), by and through its undersigned counsel, pursuant to Rule 103-818 of the Rules and Regulations of the Public Service Commission of South Carolina (the "Commission"), hereby submits these comments in the above-referenced matter in further support of the Commission's proposed rule promulgating and outlining the role of qualified, independent third-party consultants or experts in proceedings before the Commission, as contemplated pursuant to S.C. Code Ann. § 58-41-20(I). The written comments provided herein are made in addition to the oral and written comments previously submitted in the captioned matter, all of which are expressly renewed and incorporated as if stated here again.

Background and Interest

1. JDA is a national real estate developer of industrial, multifamily, self-storage, renewable energy, and commercial properties and is headquartered in Spartanburg, South Carolina. JDA has a keen interest in this third-party expert docket because of JDA's business as a solar developer.

Comments and Recommendations

2. JDA enthusiastically supports the regulation as drafted, which closely tracks the regulation that JDA itself proposed. JDA accordingly urges the Commission to adopt the regulation without any changes.

3. At their core, the Energy Freedom Act at Section 58-41-20(I) (the "Act") and the Commission's proposed Regulation 103-811.5 seek to create a mechanism whereby the Commission may obtain its own technical expertise and know-how to assess information provided by utility parties in avoided cost proceedings.

4. Under the Act, the Commission "is authorized to employ, through contract or otherwise, third-party consultants and experts in carrying out *its* duties…." Section 58-41-20(I). (emphasis added). Fundamentally, the qualified independent third-party's role and work must be viewed in light of his or her express statutory duties, which are exclusively to the Commission. *See* Section 58-41-20(I).

5. Accordingly, the Commission is to engage a "qualified independent third party to submit a report that includes the third party's independently derived conclusions as to that third party's opinion of each utility's calculation of avoided costs…." Section 58-41-20(I). In assisting the Commission with performance of its duties, the independent third-party, similar to the Commission's staff, is subject to applicable *ex parte* rules. *See* Section 58-41-20(I).

6. Here, the Commission's proposed Regulation 103-811.5 tracks and further implements the framework outlined under the Act. Rather than improperly treating the independent third-party like a separate party intervening in the proceeding, the Commission's Regulation 103-811.5 implements how the independent third-party is to advise the Commission and assist it in the performance of its duties.

7. In this matter, others have sought to compare the independent third-party's role with that of the Office of Regulatory Staff. That comparison is flawed. Rather, the Act creates a relationship more like that of the Commission and its staff. As such, Regulation 103-811.5 properly regulates how the independent third-party may or may not communicate with parties to a proceeding, clarifies that the independent third-party may communicate with the Commission and its staff, and further prevents discovery or examination of the independent third-party. All of this flows from the Act itself.

8. In their comments, other parties have fixed on the word "expert" in the Act. As a result, these parties have made the mistaken leap that the independent third-party is an "expert witness." Moreover, fixation on the word "expert" has been to the exclusion of important and more precise language actually contained in the Act.

a. First, the Act nowhere describes the independent third-party as a "witness" – that is a construct argued for by other parties.

b. Second, describing the Act's independent third-party solely as an "expert" loses sight of the Commission's flexibility to define the role. Looking at the Act, it refers to the independent third-party as a "third-party consultant," "a third-party consultant or expert," "a qualified independent third party," and "independent third party."

Again, based on the Act's actual language, the independent third-party is more akin to a technical advisor to the Commission, than a separate party to the proceeding subject to discovery. Regulation 103-811.5 as proposed properly reflects and implements the role established by the Act.

9. Turning to the proposed changes submitted in this matter, the Commission should reject the revisions requested by Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively, "Duke") and the revisions requested by Dominion Energy South Carolina, Inc. ("Dominion"), all of which, if accepted, would make the third-party expert subject to discovery, subject to being deposed,

subject to being called to testify, and subject to cross-examination. In these regards, the current regulation follows the legislative language and intent of the Energy Freedom Act (alternatively, the "Act"). The Act's Section 58-41-20(I), which addresses the third-party expert, quite plainly does not provide for the third-party expert to be subject to discovery, to be subject to deposition, to be subject to providing testimony, or to be subject to cross-examination.

10. Further, the Commission should be wary of any of the changes proposed by Duke's redline revision of the regulation. The following two egregious examples should suffice to show Duke's intent to undermine the third-party expert:

a. First, Duke suggests that the Commission remove the following language from the regulation, although the language was lifted almost verbatim from the statute: "The qualified independent third party consultant and expert's duty is to the Commission…." That language cannot be cut from the regulation because it is mandated under the statute.

b. Second, and similarly, Duke proposes to cut the following language that calls for the expert to make "an independent analysis of an electrical utility's avoided cost." That independent analysis that Duke is attempting to eliminate is the very reason the qualified independent third-party role was created in the first place. The independent analysis is the essence of the qualified third-party. Without the independent analysis, the independent third-party would be rendered useless to the Commission.

11. JDA also requests that the Commission reject Dominion's proposed language that states as follows: "The qualified independent third party consultant or expert is prohibited from furnishing, augmenting, diminishing, or modifying the evidence in the record…." However, under under the Act, the Commission is to engage a qualified independent third party to make

"independently derived conclusions" as to a utility's calculation of avoided costs. Section 58-41-20(I). Compared to the Act's language, Dominion's proposed change improperly limits the scope of the expert's independent analysis. Thus, the Commission should reject Dominion's sought-after change.

12. Finally, JDA believes that Duke's comparison of this regulation to Federal Rule of Evidence 706 is entirely irrelevant. FRE Rule 706 exists exclusively under the Federal Rules of Evidence. There is no Rule 706 analogue or counterpart under the South Carolina Rules which might control. Notably, in arguing for this application of this framework, Duke's request goes beyond what Rule 706 would allow, as Duke seeks full discovery of the independent third-party's work. That result is unsupported under their own argument and certainly without basis under the Act. Ultimately, this proposed regulation is promulgated under state law, not federal law, and it must be judge on those terms. The Commission should not depend on irrelevant federal rules of court in the drafting of this state law-based regulation.

Conclusion

Based on the foregoing, Johnson Development Associates, Inc., respectfully requests that the regulatory language as proposed by the Commission be adopted without revisions. JDA appreciates the Commission's work on the preparation of this regulation as drafted, and supports the Commission's ultimate promulgation of the third-party regulation as drafted.

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Respectfully submitted,

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This is to certify that I have caused to be served this day one copy of the **JOHNSON DEVELOPMENT ASSOCIATES, INC.'S HEARING COMMENTS IN SUPPORT OF PROPOSED RULEMAKING** to the persons named below at the addresses set forth via electronic mail:

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